

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

**D.F.P.F. Corporation, doing business as
Fine Line Construction, and Christopher
M. Colacicco, individually and doing
business as Coast Painting,**

Cases No. 06-0130-PWH
and 06-0150-PWH

From an Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

D.F.P.F. Corporation, doing business as Fine Line Construction ("Fine Line") and Christopher M. Colacicco, individually and doing business as Coast Painting ("Colacicco") each requested review of a civil wage and penalty assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to Colacicco's work on the Lincoln Elementary School Summer 2005 Modernization Project ("Project"). The cases were consolidated and set for hearing before hearing officer John Cumming in San Jose, California, on January 17, 2007. Kimble R. Cook appeared for the affected contractor Fine Line Construction and Ramon Yuen-Garcia appeared for the Division. Also appearing as a witness in this matter was Colacicco, who prior to the hearing settled his case with the Division by way of a Stipulation. Now, for the reasons set forth below, I confirm the Stipulation between the Division and Colacicco, but I find that Fine Line has no liability for that Stipulation or for the Assessment.

SUMMARY OF FACTS

The Assessment found Colacicco liable for \$24,797.34 in wages, \$5,300.00 in penalties under Labor Code section 1775, and \$14,600.00 in penalties under Labor Code section 1776.¹ One week prior to the hearing, the Division and Colacicco submitted a Stipulation for Judgment

¹ All statutory references are to the Labor Code, unless otherwise specified.

in Administrative Records finding Colacicco liable for a total of \$29,862.19, in wages and penalties.² Fine Line was not a party to the Stipulation and continued to challenge the Assessment at the hearing.

In 2005, Fine Line entered into a prime contract with the Newark Unified School District to perform construction work on the Project. Fine Line subcontracted with Colacicco to perform interior and exterior painting. Colacicco's crew worked from late July through late October 2005. According to the testimony of Fine Line president Doree Friedman and the logs kept by the school district's project inspector, there were problems with Colacicco's crew not showing up some days. Eventually, Fine Line hired another subcontractor to complete the painting.³

During the course of his work on the Project, Colacicco prepared certified payroll records ("CPRs") pursuant to section 1776 and submitted them to Fine Line. On each CPR Colacicco certified under penalty of perjury to the accuracy of the information reported and that he had paid the reported wages to each listed worker. Fine Line's Office manager Joanne Vanvick reviewed Colacicco's CPRs before authorizing the release of progress payments to Colacicco. Vanvick noticed a rate error on the fourth payroll and, after checking on the rate with the school district, required Colacicco to submit corrected CPRs. Otherwise, the CPRs appeared accurate and were accepted as valid because they were certified under penalty of perjury.

In December 2005, approximately two months after Colacicco last worked on the Project, the Division received complaints against Colacicco from Edgar Ramirez and the Work Preservation Fund. Ramirez asserted that he had worked for Colacicco on the Project from August 27, 2005, through October 3, 2005, and had received a single \$1,300.00 cash payment, which he divided among five co-workers. Ramirez asserted that he was owed \$3,231.66 for his work, and he provided calendars with hours and calculations to show how he arrived at that figure. Ramirez also filed a Stop Notice on the Project, and Fine Line paid him directly after receiving his claim information.

During its investigation into the complaints, the Division obtained Colacicco's CPRs and

² The stipulated total is \$235.15 less than the combined amount of wages and section 1775 penalties in the Assessment. However, no breakdown of the stipulated total was provided.

³ At the time of the hearing, Colacicco and Fine Line were in litigation over the subcontract.

the school district's inspector's logs. There were significant discrepancies between these sets of documents. The CPRs showed four workers working steadily through the first two weeks and then one or two workers working sporadically thereafter, while the inspector logs reported a range of one to six painting crew members throughout Colacicco's time on the Project. The CPRs also reported work being performed on days when the inspector's log showed no painting crew members present, and vice versa. Ramirez's claims when he worked on the Project matched the inspector's log reports of when there were painters at the Project. However, neither Ramirez nor any of the other workers identified in the complaints appeared on Colacicco's CPRs. The Division's investigator Sherry Gentry estimated that the CPRs reported only about two-thirds of the painting work (in terms of numbers of workers and number of days Colacicco was on the Project) reflected in the inspector's logs.

The Division tried to obtain claim information from other workers identified by Ramirez and the Work Preservation Fund, with only limited success. Colacicco denied in writing that any of those workers had worked for him during the time he was on the Project. However, in a later phone conversation with Gentry, Colacicco equivocated, stating that they had worked for him on another school job and that they did not actually work for him but for someone else. In the same conversation Colacicco said that his CPRs "were all wrong. The amounts shown as paid are wrong."

Despite the discrepancies between Colacicco's contradictory statements and the inspector's logs and other claim information from Ramirez, the Division issued an Assessment based only on the employees and work hours reported in Colacicco's CPRs. The Division did not include Ramirez because he had been paid in full by Fine Line, and the Division did not believe it had adequate information to assess wages and violations for the alleged workers whose names did not appear on the CPRs. Because the Division had no evidence of actual payments, it determined that Colacicco was liable for the full amount of prevailing wages for all reported hours, plus penalties.

Pursuant to a subpoena issued by the Division, Colacicco produced copies of two checks, one to each of the two principal employees reported on the CPRs. The amounts on the checks did not correspond to any net wage payment or combination of net wage payments reported for

either worker on the CPRs. Colacicco testified at the hearing that these were his only actual wage payments for the Lincoln School project and acknowledged that he had falsely reported making wage payments on the CPRs. Colacicco testified that hours reported on the CPRs were accurate and were based on time records that also had been produced for the Division pursuant to a subpoena. However, the time records were not offered into evidence.⁴

Fine Line contended that it was surprised by and did not believe Colacicco's testimony about not paying his workers. Fine Line had no notice of a worker not getting paid until it received notice of Ramirez's claim in December. Friedman said that in her experience, a subcontractor's workers typically would come to Fine Line if their paychecks bounced or they were not getting paid and that no employee would continue coming to work for as long as Colacicco was on the project without getting paid.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 (citations omitted).) The Division enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§90.5(a), and see *Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and section 1775(a) also pre-

⁴ At the hearing, Colacicco also testified that he had only two employees for 99 percent of the project, but his CPRs showed approximately a third of the reported work hours divided between a third employee and Colacicco himself.

scribes penalties for failing to pay the prevailing rate. Section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment. Section 1743(a) provides that the "contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order" fixing prevailing wage liabilities, although other sections limit the contractor's liability for certain penalties assessed against a subcontractor.

When the Division determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a Request for Review under section 1742. In that appeal the contractor or subcontractor "ha[s] the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§1742(b).)

Colacicco is Liable for the Amount Agreed to by Stipulation.

There is good cause to accept and enforce the Stipulation against Colacicco. A stipulation is an agreement between opposing counsel in a legal action, ordinarily for the purpose of avoiding delay, trouble, or expense in a legal action, and it need not be justified or based on evidence. (*County of Sacramento v. Workers' Compensation Appeals Board* (2000) 77 Cal.App. 4th 1114 at p. 1118.) Colacicco appears to be liable for substantial prevailing wage violations, including a large amount of penalties under section 1776(g) for failing to submit accurate CPRs. Colacicco agreed to this stipulation, and there is no reason not to accept it as an acknowledgment of his own liability.

Fine Line is Not Bound by the Stipulation.

The Division argues that Fine Line also is bound by this Stipulation because of the contractor's joint liability with the subcontractor under section 1743(a). A similar question was raised in the case of *Knowles v. Tehachapi Community Valley Hospital District* (1996) 49 Cal. App.4th 1083, in which the plaintiff in a medical malpractice action sought to impute the surgeon's acceptance of liability by stipulated judgment against the hospital district that provided him staff privileges. The court found that although the stipulation constituted presumptive evidence of the surgeon's liability and negligence, it did not preclude the non-settling hospital from seeking to disprove that negligence at trial. "As a matter of due process, a "party" who is to be

confronted with the res judicata effect of a judgment includes only a party who has the right to make a defense or to control the course of the proceeding.” (Id. at p. 1091.) Because the hospital had no right to control the surgeon’s defense and was not a party to the stipulation, it was not bound by the determinations. (Id.; see also *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 154 [obligors with joint and several liability are not in privity, and judgment against one is not res judicata as to liability of others].)

The same factors and reasoning apply here. Section 1742(a) gives both the prime contractor and affected subcontractor an independent right to seek review of the Assessment. Here, Fine Line did not participate in the settlement and had no right to control Colacicco’s defense. Consequently, the Stipulation for Judgment in Administrative Records is not conclusive as to Fine Line’s liability under the Assessment. To find otherwise would necessarily negate the right of review accorded to Fine Line, as prime contractor, under section 1742(a).

Fine Line is not Liable for the Assessment.

Fine Line has carried its “burden of proving that the basis for the . . . assessment is incorrect” (§1742(b)), notwithstanding the presumptive evidence of liability provided by Colacicco’s stipulation. Fine Line’s burden is not to disprove any possibility of liability for prevailing wages or penalties. Rather, the affected contractor must prove that the Division did not have a valid factual or legal basis for determining the violations set forth in the Assessment that was actually issued.

Here the Division based its Assessment on Colacicco’s CPRs, which the evidence shows to have been completely unreliable, and which the Division knew were unreliable. Colacicco admitted that his certifications under penalty of perjury were false, at least with respect to claimed payments. There were great discrepancies in terms of days worked and numbers of workers between the CPRs and the daily inspector’s logs, with the latter showing five painting crew members on some days rather than the maximum of four reflected in the CPRs. Yet the Division based its Assessment on these false CPRs.

Using CPRs which the Division knew to be “all wrong,” did not provide Fine Line with a reasonable opportunity to defend against what might have been Colacicco’s true liability. Because Fine Line carried its burden of proving that the basis for the Assessment was incorrect, the

Assessment must be dismissed as to Fine Line.

All Other Issues Are Moot.

In light of this decision, the related issues of Fine Line's liability for penalties under section 1775 or liquidated damages under section 1742.1 are moot.

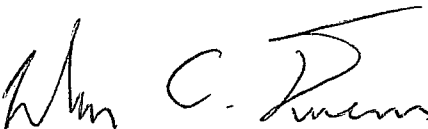
FINDINGS

1. Affected contractor D.F.P.F. Corporation, doing business as Fine Line Construction, and affected subcontractor Christopher M. Colacicco, individually and doing business as Coast Painting, filed separate timely requests for review of a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement with respect to Colacicco's work on the Lincoln Elementary School Summer 2005 Modernization Project.
2. Pursuant to the Division's and Colacicco's Stipulation for Judgment in the Administrative Records filed on January 10, 2007, and good cause appearing, Colacicco is liable for wages, penalties, and damages, in the total of sum of \$29,862.19.
3. Fine Line was not a party to the Stipulation for Judgment in the Administrative Records and is not bound by Colacicco's admission of liability for purposes of establishing Fine Line's own joint and several liability under Labor Code section 1742.
4. The Assessment against Fine Line is dismissed as unsupported by the enforcement file.

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed as to Christopher M. Colacicco, individually and doing business as Coast Painting (Case No. 06-0150-PWH), and dismissed as to D.F.P.F. Corporation doing business as Fine Line Construction (Case No. 06-0130-PWH). The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 9/5/08



John C. Duncan
Director of Industrial Relations